

65 - INDEPENDENT AGENCIES - REGULATORY

407 - PUBLIC UTILITIES COMMISSION

Chapter 820 - UTILITY REQUIREMENTS FOR NON-CORE ACTIVITIES AND
TRANSACTIONS BETWEEN AFFILIATES

SUMMARY: This rule describes the record keeping, accounting and structural requirements that Maine utilities must comply with if they engage in non-core business activities consistent with the requirements in 35-A M.R.S.A. §§ 503, 707, 708, 713, 714 and 715.

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1. **EXEMPTIONS.** Consumer-owned electric utilities as defined in section 3501 of Title 35-A, telephone utilities and water utilities are exempt from this rule except that local exchange carriers and investor-owned water utilities are subject to sections 4(C), 4(D), 6(B) and 6(C) of the rule.

2. **DEFINITIONS**

A. Aggregate Customer Information (ACI). "Aggregate customer information" is information about a population of utility customers that does not identify any individual customer and is available to a utility solely by virtue of the utility-customer relationship.

B. Capitalization. "Capitalization" means the sum of the utility's debt and equity.

C. Core Utility Service. "Core utility service" means the generation, transmission or distribution of electricity or gas, services necessary to perform those functions, services for which the utility is the provider of last resort or services the Commission requires the utility to provide, except that any service that a utility provides outside its service territory is not a core service.

D. Customer Specific Information (CSI). "Customer specific information" is information that describes the usage, technical configuration or type of utility service subscribed to by a particular customer of a public utility and is available to the utility solely by virtue of the utility-customer relationship.

E. De minimis Service. "De minimis service" is a service for which the investment does not exceed 0.1% of the utility's capitalization and total gross revenues received from providing that service do not exceed 0.1% of the utility's annual gross revenues. If the total revenues received from providing all *de minimis* services exceeds 2% of the utility's gross annual revenues, or if the utility's total investment for all *de minimis* services exceeds 2% of the utility's capitalization, the utility shall report that fact and the associated details to the Commission, which may, at its discretion, investigate and dispose of the matter as appropriate, including a determination that one or more of the services is no longer *de minimis*. If the utility continues a service thus determined not to be *de minimis*, it must be established as a non-core service consistent with the appropriate sections of this rule. Notwithstanding the preceding sentence, the utility may, at any time, provide *de minimis* services up to the above-stated individual and aggregate limits.

F. Good Will. "Good will" is a benefit or advantage to the utility of having an established reputation and established customer relationships, and includes the use of the name and reputation of the utility. The use of the good will of the utility by an affiliate is conclusively established where 1) the affiliate uses the name of the utility; or 2) the affiliate engages in joint marketing or joint advertising with the utility.

G. Intangibles. "Intangibles" are assets or property that have no material existence, and include (without limitation) company name, customer relationships, reputation, good will, rights of way, copyrights, patent rights, trade secrets, trademarks, trade names, royalty interests, licenses, franchises, leases, and mortgages.

H. Investment Grade Bond Rating. "Investment grade bond rating" is a rating for senior secured debt of above BB+ for Standard and Poor's, Duff and Phelps Credit Rating Company or Fitch Investors Service or above Ba1 for Moody's Investor Service. If a utility is not publicly rated, investment grade bond rating may be determined by a private letter rating.

I. Local Exchange Carrier. A "local exchange carrier" (LEC) is a telephone utility, as defined by 35-A M.R.S.A. § 102(19), that provides telephone exchange service or interexchange access service within a telephone exchange or interexchange access service within a telephone exchange pursuant to authority granted by or under Private and Special Law of the State of Maine; or Public Law 1895, ch. 103, § 103 or subsequent codifications or 35-A § 2102; LECs include incumbent local exchange carriers and competitive local exchange carriers, and local resellers, all as defined in Chapter 280 of the Commission's Rules. A local exchange carrier does not include a provider of commercial mobile radio service.

J. Mutual Aid Service. "Mutual aid service" means service that meets the definition of core service when provided within a utility's own service territory but that is provided temporarily outside the utility's service territory for the sole purpose of assisting another utility in meeting its service obligations.

K. Non-Core Service. "Non-core service" is any service provided by an electric or gas utility, or any affiliate of an electric or gas utility, that does not meet the definition of core utility service, *de minimis* service or mutual aid service.

L. Service Territory. "Service territory" means the geographic area in which the utility has been authorized to serve, as of the effective date of this rule, by (1) an order issued by the Commission pursuant to 35-A M.R.S.A. § 2102(1) or

§ 2104; (2) private and special law preserved by 35-A M.R.S.A.
§ 2102(2); or otherwise authorized by law.

3. SEPARATE CORPORATE ENTITY FOR NON-CORE UTILITY SERVICES

A. Limitation. A utility may not offer core and non-core services through the same corporate entity. A utility must establish a separate corporate entity to offer non-core services.

B. Establishment of Separate Corporate Entity. When a utility establishes a separate corporate entity through which to provide non-core services, the establishment of that entity is subject to the reorganization requirements in 35-A M.R.S.A. § 708.

C. Use of Existing Affiliate. A utility may undertake non-core utility activities in an existing affiliated interest, upon complying with the notice requirements in Section 7 below. A utility must obtain Commission approval pursuant to 35-A M.R.S.A. § 707 for any new arrangement or contract between the existing subsidiary and core utility arising from the non-core activity.

D. Transactions Between a Utility and Its Affiliate(s). A utility must seek Commission approval for all transactions between the utility and its affiliate or affiliates pursuant to 35-A M.R.S.A. § 707 and section 4 of this rule.

4. VALUE OF UTILITY GOODS, SERVICES AND INTANGIBLES

A. Valuing Utility Equipment, Facilities, Services, or Personnel used by an Affiliate or for De Minimis Service. Any utility equipment, facility, service or personnel used by an affiliate or used by a utility to provide *de minimis* service shall be charged to the affiliate at the tariffed rate, if available, or in the absence of a tariffed rate at the market price, if available, or otherwise at fully distributed cost. The amount charged in accordance with this subsection shall be recorded as income on the books of the utility.

1) Fully Distributed Cost Methodology. To the extent a utility must assign and apportion costs between its core utility service and non-core activities using the fully distributed cost methodology, it shall do so in accordance with the principles set forth in the Federal Communication Commission's rules regarding cost allocations to regulated and non regulated activities, 47 C.F.R. § 64.901(b)(1-4), attached hereto as appendix A.

B. Valuing Utility Assets Transferred to Affiliate. A utility asset transferred to an affiliate shall be recorded at the market price of the asset.

C. Value of Good Will. The value of the utility's good will used by an affiliate must be determined as follows:

1. The value of good will to be paid annually by an affiliate must be determined on an annual basis for an initial 3-year period beginning on the date that the affiliated transaction is approved or upon the date that the affiliate will commence use of the good will, whichever is later.
2. At the end of the initial 3-year period, the Commission shall reexamine the value of good will to be paid by the affiliate for the use of good will for the next 3 years;
3. The value of good will shall be presumed to be, and calculated as, 1% of the total capitalization of the affiliate, or 2% of the gross revenues of the affiliate, whichever is less, and shall be paid annually by the affiliate. Where the name of the utility has been used in Maine by the utility for less than 3 years, the value of good will shall be presumed to be zero. At the end of six years from the date the affiliated transaction is approved or upon the date that the affiliate commences use of the good will, whichever is later, the value of good will is zero.
4. Any party may present evidence that the value of good will is greater than, or less than, the presumptions stated in paragraph 3.
5. The value of good will and the payments for its use are calculated on a going-forward basis. An affiliate is not required to pay for good will used before the effective date of this rule.
6. This subsection applies only to affiliates created on or after September 19, 1997.

D. Value of Utility Intangibles Transferred to an Affiliate or Used by an Affiliate. The value of any utility intangible, other than good will, transferred to or used by an affiliate is the market value of the intangible.

E. Valuing Use by a Utility of an Affiliate's Equipment Facilities, Services or Personnel. Equipment, facilities,

services or personnel of an affiliate used by a utility shall be priced at the same price charged non-affiliates. If no such price is available, the service, facility or personnel shall be priced at the market price of the use of the equipment, facility, service or personnel.

F. Value of Affiliate Asset Transferred to a Utility. An affiliate asset transferred to a utility shall be recorded at the market price of the asset.

G. Cost Manual. A utility shall maintain a cost manual or other written material documenting its cost allocation methodology.

H. Charges to Affiliate; Reports. The utility shall charge its affiliate an appropriate amount determined pursuant to subsections A through F. Any extension of payment terms beyond the terms offered in the course of normal business requires Commission approval. As part of its annual report, filed pursuant to 35-A M.R.S.A. § 504, the utility shall indicate the amount received from its affiliates for the use of the utility's equipment, facilities, services, personnel and intangibles. The utility's outside auditors must check for compliance with this chapter and applicable Commission orders.

5. LIMITATION ON UTILITY INVESTMENTS IN AFFILIATES

A. Investment Permitted without Commission Approval. A utility that has attained investment grade bond rating and has not filed for, or been granted, a temporary rate increase pursuant to 35-A M.R.S.A. § 1322 may invest in an affiliated interest a total amount not to exceed five percent of the utility's capitalization without specific Commission approval of the investment.

B. Investment Not Permitted. No petition for affiliated interest or reorganization approval for a utility to invest in a non-regulated affiliated interest shall be approved if the utility's bond rating is below investment grade or if the utility has filed for, or been granted, a temporary rate increase pursuant to 35-A M.R.S.A. § 1322 within six months of the filing for approval to invest in the affiliated interest. This subsection does not apply to a utility that has not attained investment grade bond rating because it is not publicly rated and does not have a private letter bond rating.

C. Investment Governed by Sections 707 and 708 of Title 35-A. If subsections A and B do not apply to a utility's petition to invest in an affiliate, the petition is governed by sections 707 and 708 of Title 35-A.

6. RATEMAKING TREATMENT

A. Below the Line Treatment. All non-core and *de minimis* utility activities will be treated as below the line for ratemaking purposes.

B. Value of Intangibles; Presumption in Favor of Allocation to Ratepayers. A rebuttable presumption exists that the positive value of utility intangibles transferred to or used by an affiliate will be allocated entirely to ratepayers. A utility may rebut this presumption by providing evidence that the intangible is wholly unrelated to the utility's provision of service to ratepayers.

C. Ratemaking Methodology for Intangibles Other Than Good Will. Subject to the allocation requirements set forth in subsection B of this section, the specific ratemaking methodology used to reflect the value of an intangible other than good will will be determined in the proceeding for approval of the affiliated transaction pursuant to 35-A M.R.S.A. § 707.

7. FILING REQUIREMENTS

A. Notification of Intent to Undertake Non-Core Utility Activity. A utility must notify the Commission of each non-core activity it intends to pursue within 30 days of the commencement of operations.

B. Type of Notification.

- 1) New Corporate Entity. If a utility plans to establish a new corporate entity in which to conduct the non-core utility activity, notification will be achieved when it makes its required filing pursuant to 35-A M.R.S.A. § 708(2).
- 2) Use of Existing Affiliate. If a utility plans to undertake a non-core activity in an existing affiliate, it shall submit a letter to the Commission describing the non-core utility activity and the name of the affiliate in which it will undertake the same activity and seek any approvals required by 35-A M.R.S.A. § 707.

C. Information to be Included with Section 707 Filing. For all requests for approval of affiliated transactions pursuant to 35-A M.R.S.A. § 707, the utility seeking approval must file prefiled testimony including the following, as applicable.

- 1) An indication of the specific affiliated transactions for which the utility seeks approval pursuant to section 707;
- 2) For any contract or arrangement expected to involve the use by an affiliated interest of any asset, including intangibles, the utility's determination of the value of the asset;
- 3) Supporting documentation for the utility's asset value determination as follows:
 - (a) Good Will. To the extent the utility contests the presumption set forth in section 4(C) for the value of good will, the utility shall file a market study or other relevant information providing evidence that an alternative value should be considered.
 - (b) Intangibles Other Than Good Will. For intangibles other than good will the utility shall provide a market study or appraisal estimating the market value of the intangible asset.
 - (c) Tangible assets. For any tangible asset, documentation for the price charged to other affiliates, or the market price of comparable assets.
- 4) Any support services agreements; and
- 5) Any other agreements and contracts for which the utility seeks approval.

D. Information Required to Be Included with Section 708 Filing. For all requests for approval of reorganizations pursuant to 35-a M.R.S.A. § 708, the utility seeking approval must file prefiled testimony including the following information, as applicable:

- 1) The amount the utility seeks to invest as part of the reorganization in the affiliated interest;
- 2) If the utility proposes to invest any amount in the affiliated interest, it shall provide:
 - a. A statement of the utility's bond rating or equivalent credit rating; and

- b. The utility's cash flow and earnings projections and pro forma balance sheets for a period of no less than two years from the end of the fiscal year in which the filing is made.

8. STANDARDS OF CONDUCT

A. Limits on Use of Customer Information.

- 1) Use by Affiliate of CSI or ACI. A utility affiliate must purchase any CSI or ACI it wishes to use from the core utility at market value.
- 2) Availability of CSI or ACI. If a utility makes CSI or ACI available to a non-core utility subsidiary, it must make the CSI or ACI available to any other entity requesting it, on the same terms.
- 3) Affirmative Permission of Customer Required. To use any CSI (as distinguished from ACI), the utility must obtain affirmative, written permission from the customer.

B. Obligation to Provide Information. If a utility provides information to an affiliate related to its status as a public utility, it must provide such information upon request to nonaffiliated companies.

C. Preferences Forbidden. The utility may not act in preference to its affiliate or affiliates in providing access to utility facilities or services or in influencing utility customers to use the services of its affiliates. A utility that provides the name of its affiliate to a customer interested in the services of its affiliate must also provide the names of non-affiliated entities providing such services.

D. Additional Standards of Conduct. This rule does not limit the Commission from imposing additional standards of conduct on a utility's activities related to its affiliated interests to the extent necessary to protect the public interest.

9. WAIVER

The Commission may, upon its own motion, or, upon the request of any utility subject to the provisions of this Chapter, waive any of the requirements of this Chapter that are not required by statute upon a finding of good cause and that the waiver would not be inconsistent with the purposes of this Chapter or sections 707, 708, 713, 714 and 715 of Title 35-A. A waiver may be granted by the Commission, the Director of Technical Analysis, or the Hearing Examiner assigned to a proceeding related to this rule.

BASIS STATEMENT: The factual and policy basis for this rule is set forth in the Commission's Statement of Factual and Policy Basis and Order Provisionally Adopting Rule, Commission Docket No. 97-886, issued on February 18, 1998, and the Order Finally Adopting Rule and Statement of Factual and Policy Basis, Commission Docket No. 97-886, issued on July 7, 1998. Copies of these Orders have been filed with this rule at the Office of the Secretary of State. Copies may also be obtained from the Administrative Director, Public Utilities Commission, 242 State Street, 18 State House Station, Augusta, Maine 04333-0018.

AUTHORITY: 35-A M.R.S.A. §§ 503, 707, 708, 713, 714 and 715.

EFFECTIVE DATE: This rule was approved as to form and legality by the Attorney General on July 13, 1998. It was filed with the Secretary of State on July 5, 1998 and will be effective on August 14, 1998.